

STATE OF MICHIGAN
IN THE SUPREME COURT
Appeal from the Michigan Court of Appeals
Kirsten Frank Kelly, P.J., and Douglas B. Shapiro and Ronayne Krause, JJ.

PEOPLE OF THE STATE OF MICHIGAN, Supreme Court No. 147735

Plaintiff-Appellant,

Court of Appeals No. 312966

v

Wayne Circuit Court No.
12-003749-FH

THABO JONES,

Defendant-Appellee.

**BRIEF OF ATTORNEY GENERAL BILL SCHUETTE AS *AMICUS CURIAE*
IN SUPPORT OF THE PEOPLE OF THE STATE OF MICHIGAN**

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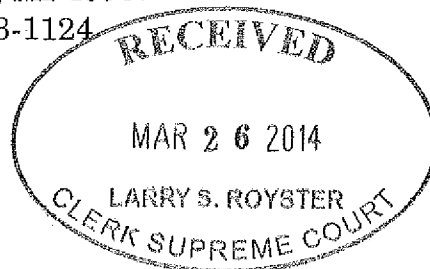


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STATEMENT OF QUESTIONS PRESENTED

In its order entered November 27, 2013, this Court granted the prosecution's application for leave limited to the following issues:

- I. Whether a legislative provision barring consideration of a necessarily included lesser offense violates the separation of powers doctrine, Const 1963, art 3, § 2.
- II. Whether MCL 257.626(5) violates a defendant's right to a jury trial by foreclosing a jury instruction on a lesser offense; and
- III. Whether MCL 257.601d is a necessarily included lesser offense of MCL 257.626(4).

The Attorney General plans to address only the first question.

INTRODUCTION

Given the comprehensive brief by Wayne County on the issues, the Attorney General only wishes to address one: the narrow – and often thorny – question about whether the legislative enactment at issue here is a procedural or a substantive rule under Michigan law. The gold standard for determining whether something is substantive is whether the Legislature enacted the law based exclusively on considerations of “judicial dispatch” or rather whether the legislation reflects a “principle of public policy.” The answer in this case is straight-forward. The Legislature created this limitation to ensure that a criminal defendant would not receive a windfall and be convicted of only a misdemeanor. It is a substantive rule.

In specific, for the crime of reckless driving causing death, a 15-year felony, the Legislature has excluded consideration of the one-year misdemeanor of moving violation causing death as a possible conviction, even though it is a necessarily-lesser-included offense. The ordinary rule under *People v Cornell*, 466 Mich 335, 354 (2002) is that a jury is given the instructions of all necessarily-lesser-included offenses, including *misdemeanors*. Because the jury is never instructed on the possible punishments with respect to these offenses, the jury does not necessarily understand the significance of the conviction if it elects to compromise and convict of a lesser offense. The difference between assault with intent to murder (life offense) and aggravated assault (one-year misdemeanor) in punishment is significant, but not in the sound of the crime. In the exercise of its authority over policy considerations, the Legislature has elected to take this option away from the jury. It is a substantive rule and a decision the Legislature has the right to make.

COUNTER-STATEMENT OF FACTS AND PROCEEDINGS BELOW

Attorney General Schuette adopts the People's recitation of facts and account of proceedings below as accurate and complete.

ARGUMENT

- I. The statute does not violate separation of powers because it reflects substantive "policy considerations" involving more than "the orderly dispatch of judicial business."**

The question whether a criminal defendant who is charged with a significant felony, as here a crime that is analogous to manslaughter, should by right be entitled to an instruction on a misdemeanor where that crime is a necessarily lesser is an important one of policy. It is a question the Legislature is perfectly positioned to answer — it is an issue of policy. This Court expressly recognized the point in *Cornell*. 466 Mich at 353 ("Determining what charges a jury may consider does not concern merely the judicial dispatch of litigation. Rather, the statute concerns a matter of substantive law.") (citations and quotation marks omitted). This Court should reject Jones' argument that this is a procedural rule that violates the separation of powers.

- A. The exclusion of the one-year misdemeanor reflects the legislative policy determination and is therefore substantive.**

This Court's precedent demonstrates that the focal point of the distinction between procedural and substantive rules in the context of separation of powers under Const 1963, art 6, § 5 rests on whether a statute is born of "policy considerations involving the orderly dispatch of judicial business on the one hand

[or] policy considerations involving something more than that on the other hand.”

McDougall v Schanz, 461 Mich 15, 31; 597 NW2d 148 (1999). The two central cases from this Court’s jurisprudence applying this standard are *McDougall* and *People v Watkins*, 491 Mich 450; 818 NW2d 296 (2012), and they confirm the wisdom of recognizing the issue here as policy one for the Legislature.

In *McDougall*, the issue was whether Michigan’s “strict requirements” for qualifying an expert in medical malpractice case reflected a policy determination beyond the mere regulation of the “day-to-day procedural operations of the courts.” *Id.* at 31. The Court relied on the Colorado Supreme Court upholding Colorado’s rape shield statute, finding that it is “substantially similar” to the provision at issue. *Id.* at 31-32, quoting *People v McKenna*, 196 Colo 367, 371-372, 585 P2d 275 (1978). The key to the Court’s holding was to eschew the “mechanical approach” of categorizing a rule as a rule of evidence and therefore always within the exclusive preserve of the judiciary. *McDougall*, 461 Mich at 29 (“We will not continue mechanically to characterize all statutes that resemble ‘rules of evidence’ as relating solely to practice and procedure.”).

In *Watkins*, the Court addressed the Legislature’s creation of a per se rule, admitting the evidence of “other-acts evidence in cases involving sexual misconduct against minors.” 491 Mich at 482. By doing so, the Legislature displaced MRE 404(b) with MCL 768.27a for certain offenses. As in *McDougall*, the Court found that there was no violation of separation of powers because this was a policy decision, i.e., “a substantive legislative determination that juries should be privy to

a defendant's behavioral history in cases charging the defendant with sexual misconduct against a minor." *Watkins*, 491 Mich at 476. As in *McDougall*, the Court rejected a "mechanical" approach that was insensitive to the real policy concerns underlying the law.

That approach demonstrates the wisdom of this Court's analysis in *Cornell* at the heart of this case – the decision to limit necessarily-lesser offenses. Just as in *McDougall* and *Watkins*, the Court cannot just mechanically view all jury instruction questions as procedural ones. Rather, the question of "what charges a jury may consider" is a substantive issue, *Cornell*, 466 Mich at 353, one that has been resolved here. The Legislature elected to avoid the "run-away" jury, who may elect to reach a lesser conviction, out of compromise or compassion, particularly where the jury is unaware of the punishments at issue. The crime of reckless driving causing death is a 15-year felony, akin to manslaughter, MCL 257.626(4), while the crime of moving violation causing death is only a one-year misdemeanor, MCL 257.601d.

The history of the Michigan's past law in this area supports the point. Prior to the decision in *Cornell*, the controlling case on the issue of lesser instructions was *People v Chamblis*, 395 Mich 408, 429; 236 NW2d 473 (1975). The *Chamblis* rule shielded prosecutors from juries being able to reach verdicts on misdemeanors when charged with a felony:

We are establishing a rule today, as a matter of policy, limiting the extent of compromise allowable to a jury in deciding whether to convict of a lesser included offense. In any case wherein the charged offense is punishable by incarceration for more than two years, the court, wheth-

er or not requested, may not instruct on lesser included offenses for which the maximum allowable incarceration period is one year or less.

This Court in *People v Stephens*, 416 Mich 252, 255; 330 NW2d 675 (1982) overruled this test, and adopted a five-part test to determine whether a trial court should provide a jury instruction on a misdemeanor offense. In *Cornell*, a 2002 decision, this Court swept these accretions away, and returned to MCL 768.32, providing for an instruction only when it was a “necessarily lesser offense” where a rational review of the evidence would allow it. *Cornell*, 466 Mich at 357, overruling *Chamblis* and *Stephens*. In 2008, 463 PA 2008, the Legislature created this 15-year felony, and then created a floor by which a jury could not reach a “compromise” verdict and find a defendant guilty of a one-year misdemeanor, which sounds similar to the principal offense. At the same time, it repealed negligent homicide and felonious driving. See MCL 750.324; and MCL 257.626c.

The analysis in *Chamblis*, although not appropriate for this Court, is a proper one for the Legislature’s consideration:

We are convinced that the cause of justice is not well served by convicting of assault and battery a defendant charged with murder. As a matter of policy people who commit serious crimes should be punished for those offenses, and those who did not commit such serious crimes should not be tried for those crimes only to be found guilty of a much lower offense. In the example cited, if the most serious offense for which a jury feels conviction is justified is assault and battery, the original charge of murder appears to bear no realistic relationship to the offense committed, and no good purpose would be served by allowing such an instruction. [*Chamblis*, 395 Mich at 428.]

Such considerations are policy ones, and as this Court noted in *Cornell* are for the Legislature to consider, as it has done here.

B. Jones' arguments to the contrary are unavailing.

In his appellee's brief, Jones raises two basic arguments in opposition to the conclusion that this is a substantive rule: (1) it is the role of the judiciary to set jury instructions; and (2) the direction in MCL 257.626(5) conflicts with MCL 768.32. These arguments are not persuasive.

First, the fact that jury instructions "have always been under the control of the judiciary," see Jones' Brief, p 9, does not answer the question. This argument is analogous to the one that the rules of evidence are always the exclusive preserve of the judiciary, an argument expressly rejected in *McDougall* and *Watkins*. Rather, the issue is whether the Legislature has more than the "day-to-day procedural operations" of the court in mind. And of course the Legislature does here. It wishes to protect prosecutors from losing the ability to obtain a more serious conviction for a defendant's gross negligence where it results in the death of another.¹

Second, the conclusion does not "conflict" with MCL 768.32(1), which provides that a jury "may find the accused person guilty of a degree of that offense inferior." Jones' Brief, p 8. This argument overlooks the easier resolution, which is to prefer the specific to the general, giving effect to each statute. See *People v Buehler*, 477 Mich 18, 26; 727 NW2d 127 (2007) ("the more recent and more specific statute controls over the older and more general statute"). That principle applies here.

¹ For what it is worth, this conclusion is consistent with the Legislative Analysis for SB 104 of 2007, which became 463 PA 2008. See Attachment A, Legislative Analysis, p 1 ("The current penalties are too low and do not adequately reflect the seriousness of the offenses. Injuries sustained in an automobile accident can have a life-changing impact on the injured party, while the person responsible for the accident might be subject only to a traffic citation.").

CONCLUSION AND RELIEF REQUESTED

For these reasons, the Attorney General joins the People of the State of Michigan in asking this Court to reverse the decision of the Court of Appeals.

Respectfully submitted,

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March 26, 2014

Attachment A



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BILL



ANALYSIS

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Senate Bill 104 (Substitute S-3 as passed by the Senate)
Sponsor: Senator Valde Garcia
Committee: Transportation

Date Completed: 8-5-08

RATIONALE

Reckless driving, which involves operating a vehicle in willful or wanton disregard for the safety of people or property, is a misdemeanor under the Michigan Vehicle Code. Felonious driving under the Vehicle Code, and negligent homicide under the Michigan Penal Code, are similar violations that involve the serious injury or death of another person, respectively. Some are concerned that the standards for determining whether a person is guilty of negligent homicide or felonious driving are ambiguous, leading to inconsistent enforcement and uncertainty among members of the public as to what the penalties for certain actions will be. In addition, some have suggested that the language describing those two offenses is outmoded, and should be replaced with updated language in the Vehicle Code that would be consistent with other provisions of that statute. Further, it has been suggested that driving offenses causing death or serious injury should carry higher penalties than exist currently, to discourage reckless behavior while operating a vehicle and to reduce the number of fatal or injurious accidents.

CONTENT

The bill would amend the Michigan Vehicle Code to establish penalties for moving violations that seriously injured or killed another person, as follows:

-- A moving violation that caused serious impairment of a body function of another person would be

a misdemeanor punishable by up to 93 days and/or \$500.

- A moving violation that caused the death of another person would be a misdemeanor punishable by imprisonment for up to one year or a maximum fine of \$2,000, or both.
- Reckless driving that caused serious impairment of a body function of another person would be a felony punishable by imprisonment for up to five years or a fine of at least \$1,000 but not more than \$5,000, or both, and vehicle immobilization.
- Reckless driving that caused the death of another person would be a felony punishable by imprisonment for up to 15 years or a fine of at least \$2,500 but not more than \$10,000, or both, and vehicle immobilization.

Also, for the offenses described above, the bill would require the Secretary of State to do the following:

- Suspend or revoke the offender's driver license.
- Assess a driver responsibility fee of \$1,000 each year for two consecutive years.
- Record six points on the offender's driving record.

In addition, for a moving violation resulting in an at-fault collision with another vehicle, a person, or any other object, the bill would increase the civil penalty from \$100 to \$125 and require the SOS to record four points.

The bill would repeal sections of the Vehicle Code and the Michigan Penal Code that prescribe penalties for felonious driving and negligent homicide, respectively.

The bill would take effect October 31, 2010, and is described in detail below.

Reckless Driving

Under the Michigan Vehicle Code, a person who drives a vehicle on a highway, parking area, frozen lake, stream or pond, or other place open to the public, in willful or wanton disregard for the safety of people or property is guilty of reckless driving, a misdemeanor punishable by imprisonment for up to 93 days or a maximum fine of \$500, or both.

Under the bill, if a person operated a vehicle in violation of this provision and by the operation of the vehicle caused serious impairment of a body function to another person, the violator would be guilty of a felony punishable by imprisonment for up to five years or a fine of not less than \$1,000 or more than \$5,000, or both.

If a person who operated a vehicle in violation of the reckless driving provision and by the operation of the vehicle caused the death of another person, the violator would be guilty of a felony punishable by imprisonment for up to 15 years or a fine of at least \$2,500 but not more than \$10,000, or both. In a prosecution under this provision, the jury could not be instructed regarding the crime of moving violation causing death.

In either case, the judgment of sentence could impose the sanction permitted under Section 625n of the Code. (Under that section, a sentence for certain violations may require the forfeiture of the vehicle if it is owned by the defendant, or the return of the vehicle to the lessor if the defendant leases the vehicle.) If the vehicle were not ordered forfeited, the court would have to order vehicle immobilization in the judgment of sentence.

In addition, the SOS would have to record six points on the person's driving record.

Moving Violation Causing Death or Serious Impairment

Under the bill, a person who committed a moving violation that caused the death of another person would be guilty of a misdemeanor punishable by imprisonment for up to one year or a maximum fine of \$2,000, or both. A person who committed a moving violation that caused serious impairment of a body function to another person would be guilty of a misdemeanor punishable by imprisonment for up to 93 days or a maximum fine of \$500, or both.

As used in these provisions, "moving violation" would mean an act or omission prohibited under the Code or a substantially corresponding local ordinance that occurred while a person was operating a motor vehicle, and for which the person was subject to a fine.

These provisions would not prohibit the person from being charged with, convicted of, or punished for any other violation of law.

In addition, the SOS would have to record six points on the person's driving record.

Suspension & Revocation

The bill would require the SOS to suspend a person's license for one year upon receiving a record of the person's conviction for a moving violation that caused serious impairment of a body function to another person or the death of another person.

Currently, the SOS must suspend a person's license for one year for a violation of the reckless driving provision (Section 626 of the Code). The bill would retain that provision, although the SOS would have to revoke a person's license and deny issuance of a license to a person who had been convicted of reckless driving that caused serious impairment of a body function to another person or the death of another person.

Driver Responsibility Fee

The Code requires the SOS to assess a driver responsibility fee of \$500 each year for two consecutive years for an individual who is found guilty of reckless driving. The bill would retain that provision but require

the SOS to assess a driver responsibility fee of \$1,000 each year for two consecutive years for reckless driving or a moving violation that caused the death or serious impairment of a body function of another person. (The \$1,000 fee currently applies to negligent homicide, manslaughter, or a felony resulting from the operation of a motor vehicle.)

Vehicle Immobilization: Prior Conviction

Under the Code, the court must order vehicle immobilization for a minimum of one and a maximum of three years for a conviction of certain violations related to driving while intoxicated, driving while visibly impaired, or driving after ingesting a Schedule 1 controlled substance, within 10 years after two or more prior convictions. The bill would remove the 10-year limit for the prior convictions, and would include as a "prior conviction" a conviction for reckless driving or a moving violation that caused the death or serious impairment of a body function of another person.

Such a conviction also would be considered a prior conviction in provisions concerning license suspension or revocation, and penalties for drunk driving offenses.

At-Fault Collision

Under the Code, if a person admits responsibility for a civil infraction "with explanation", the judge or district court magistrate may order the person to pay a civil fine of up to \$100 and court costs.

Under the bill, if the civil infraction were a moving violation that resulted in an at-fault collision with another vehicle, a person, or any other object, that fine would be increased by \$25.

Also, for a moving violation that resulted in an at-fault collision with another vehicle, a person, or any other object, the SOS would have to record four points on the operator's driving record.

Chemical Testing

Under the bill, a person who was arrested for reckless driving or a moving violation that caused the death or serious impairment of a body function of another person would be considered to have given consent to

chemical tests of his or her blood, breath, or urine for the purpose of determining the amount of alcohol or presence of a controlled substance in his or her blood or urine.

Currently, this applies to a person arrested for felonious driving or negligent homicide, terms the bill would replace.

Repeals

The bill would repeal Section 626c of the Vehicle Code, which provides that a person who operates a vehicle upon a highway or other place open to the general public or generally accessible to motor vehicles, carelessly and heedlessly in willful and wanton disregard of the rights or safety of others, or without due caution and circumspection and at a speed or in a manner that endangers or is likely to endanger any person or property, that results in the serious impairment of a body function of a person but does not cause death, is guilty of felonious driving punishable by imprisonment for up to two years or a maximum fine of \$2,000, or both.

The bill also would repeal Sections 324 and 325 of the Michigan Penal Code. Section 324 establishes a penalty for negligent homicide. Under that section, any person who causes the death of another, by operation of a vehicle at an immoderate rate of speed or in a careless, reckless or negligent manner, but not willfully or wantonly, is guilty of a misdemeanor punishable by imprisonment for up to two years or a maximum fine of \$2,000, or both.

Under Section 325, the crime of negligent homicide must be deemed to be included within every crime of manslaughter charged to have been committed in the operation of any vehicle, and in any case in which the defendant is charged with manslaughter committed in the operation of any vehicle, if the jury finds the defendant not guilty of manslaughter, it may render a verdict of guilty of negligent homicide.

MCL 257.303 et al.

ARGUMENTS

(Please note: The arguments contained in this analysis originate from sources outside the Senate Fiscal Agency. The Senate Fiscal Agency neither supports nor opposes legislation.)

Supporting Argument

The current standard for determining whether a person is guilty of negligent homicide or felonious driving is ambiguous, based on whether the person operated the vehicle in a careless, reckless or negligent manner. The language prescribing those offenses is antiquated and based on common law notions of negligence. Applying those concepts to criminal law creates some uncertainty about what constitutes a violation, leading to inconsistent enforcement of the law. For example, a driver who loses control of a car on an icy overpass and is involved in a fatal accident could have foreseen the possibility that the bridge might be icy, and therefore could be charged with negligent homicide, although most people would not consider that to be appropriate in such a case. The bill would remove that ambiguity, and instead enact prohibitions under which a person would not be guilty of a criminal offense unless a moving violation had occurred. This would reduce inconsistencies in the application of the law and clarify proscribed conduct.

The penalties under the bill also would be an increase over the current penalties for felonious driving and negligent homicide, which could deter drivers from driving recklessly. The current penalties are too low and do not adequately reflect the seriousness of the offenses. Injuries sustained in an automobile accident can have a life-changing impact on the injured party, while the person responsible for the accident might be subject only to a traffic citation. Motorcyclists in particular are at risk of serious injury or death in an accident, and although there have been various initiatives to alert drivers to motorcyclists, one effective way to reduce the incidence of accidents would be to make drivers aware that they could be subject to significant criminal penalties for a traffic violation that resulted in the serious injury or death of another person.

The penalties under the bill also would be consistent with the enhanced penalties for drivers who cause injury to or the death of a highway construction worker in a work zone or agricultural worker moving farm equipment on a highway, enacted under Public Acts 103 and 104 of 2001.

Legislative Analyst: Curtis Walker

FISCAL IMPACT

The bill would have an indeterminate fiscal impact on State and local government. Local units would incur the cost of misdemeanor probation and incarceration in local facilities, which vary by county. The State would incur the cost of felony probation at an average annual cost of \$2,000, and the cost of incarceration in a State facility, at an average annual cost of \$31,000. Penal fine revenue would benefit public libraries.

There would be minimal programming costs to update the Secretary of State's computer systems in order to code them for the violations in question. The bill could generate license reinstatement fee revenue. The \$125 reinstatement fee remains within the Secretary of State's budget to be used at the discretion of the Secretary of State.

Fiscal Analyst: Joe Carrasco
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A07081s104a

This analysis was prepared by nonpartisan Senate staff for use by the Senate in its deliberations and does not constitute an official statement of legislative intent.